85-2077

No.

Supreme Court, U.S.
FILED
JUN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BILLY BRYAN, ARTHUR COMER,
GEORGE BULLARD and CHARLIE GREENE,
Petitioners,

v.

ELBERT ERKINS, SAMUEL DENSON,
U.S. FIDELITY & GUARANTY CORP.,
UNITED STEELWORKERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JEROME A. COOPER
(Counsel of Record)
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576
Attorney for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the six-months limitations period contained in § 10(b) of the National Labor Relations Act (29 U.S.C. § 160(b)) (herein "NLRA") establishes the limitations period for the cause of action created by 29 U.S.C. § 501(b) (herein "LMRDA").

2. Whether an action provided in Title V of LMRDA is governed by the same six-months time limitation as are actions provided in Title I and Title VI of the same act.

3. Has the court of appeals correctly interpreted *DelCostello v. Int'l Bro. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983) in failing to apply that case's principles to this suit under § 501(b) of LMRDA?

4. Whether an individual's status as member in a union and standing to bring suit under 29 U.S.C. § 501(b) of LMRDA terminate (as the union's constitution provides) when his employment within the union's jurisdiction terminates; when he is no longer represented by the union; no union meetings are held; and the local union has become dormant under a liquidating administrator.

5. Did Congress, by Section 3(o) of LMRDA (29 U.S.C. § 402(o)) intend to confer lifetime membership status, absent "expulsion" proceedings, upon individuals who were once, but are no longer, employed within the union's jurisdiction?

6. In a suit under § 501(b) of LMRDA may plaintiffs' attorneys be awarded attorneys' fees in excess of a "reasonable part of the recovery"?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. Importance of the Issues Presented	9
II. Application of § 10(b) of the NLRA	10
A. Under Section 501(b) of the LMRDA Plaintiffs Are Not Entitled to an Award of Attorneys' Fees in Excess of the Monetary Recovery Where, as Here, the Only Element of Recovery is a Money Judgment	13
CONCLUSION	15

TABLE OF AUTHORITIES

Cases: Page

Davis v. United Auto, Aerospace & Agricultural & Implement Workers of America, 765 F.2d 1510 (11th Cir. 1985) 11
DelCostello v. Int'l Bro. of Teamsters, 462 U.S. 151, 103 S.Ct. 2281 (1983) ..... i, 6, 8, 10, 11, 12
Erkins v. Bryan, 494 F.Supp. 732 (M.D. Ala. 1980) ..... *passim*
Erkins v. Bryan, 598 F.Supp. 240 (M.D. Ala. 1984) ..... *passim*
Erkins v. Bryan, 663 F.2d 1048 (11th Cir. 1981), *cert. den.*, 459 U.S. 989 (1982) ..... *passim*
Erkins v. Steelworkers, 723 F.2d 837 (11th Cir. 1984) ..... *passim*
Local Union 1398, United Steelworkers v. United Steelworkers, 748 F.2d 180 (3rd Cir. 1984) 11
Taylor v. Great Lakes Seaman's Union, 701 F.2d 590 (6th Cir. 1983) 9
Trbovich v. Mine Workers, 404 U.S. 528 (1972) 13

Statutes:

28 U.S.C. § 1254(1) 2
Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 151, *et seq.*:
29 U.S.C. § 158(b)(1)(A) ..... *passim*
National Labor Relations Act, as amended, 29 U.S.C. § 160(b) ..... *passim*
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401, *et seq.*:
29 U.S.C. § 402(o) ..... *passim*
29 U.S.C. § 411(a)(2) ..... *passim*
29 U.S.C. § 501(b) ..... *passim*
42 U.S.C. § 1988 14

Miscellaneous:

2 National Labor Relations Board, *Legislative History of the Labor-Management Reporting And Discolsure Act of 1959* 9, 14

TABLE OF AUTHORITIES—Continued

	Page
Hearings on Union Financial and Administrative Practices and Procedures, 85th Cong., 2nd Sess. 363, 1118 (1958)	10
§ 1555, 1 Leg. Hist. 338	10
2 Legis. Hist. 1025	14
104 Cong. Rec. 11327	13
104 Cong. Rec. 11329	13
122 Cong. Rec. 33	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ———

BILLY BRYAN, ARTHUR COMER,
GEORGE BULLARD and CHARLIE GREENE,
Petitioners,

v.

ELBERT ERKINS, SAMUEL DENSON,
U.S. FIDELITY & GUARANTY CORP.,
UNITED STEELWORKERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Billy Bryan, Arthur Comer, George Bullard and Charlie Greene hereby petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, enabling this Court to review the judgment in *Erkins and Denson v. Bryan, et al.*, No. 84-7455, and *Erkins and Denson v. Bryan, et al.*, No. 84-7774.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama is reported at 598 F.Supp. 240 (M.D. Ala. 1984), and is reprinted as Appendix A to this petition. The opinion of the United

States Court of Appeals for the Eleventh Circuit is reported at 785 F.2d 1538 (11th Cir. 1986), and is reprinted as Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on April 8, 1986. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 et seq., provides in pertinent part as follows:

> § 3. *Definitions* [29 U.S.C. § 402]
>
> For the purposes of this chapter—
>
> (o) "Member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.
>
> § 501. *Fiduciary responsibility of officers of labor organizations* [29 U.S.C. § 501]
>
> (b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court

of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

STATEMENT OF THE CASE

Plaintiffs (respondents Erkins and Denson) were employed by the American Buildings Company ("the Company") at its Eufaula, Alabama plant. United Steelworkers of America ("USWA") was the exclusive bargaining representative of the approximately 300 production and maintenance employees at the plant. USWA chartered a local union—Local 7326 ("the Local")—to assist it in performing its duties as the bargaining representative. The membership of Local 7326 was limited to the employees of the Company's Eufaula plant.

On December 3, 1976, upon expiration of its collective bargaining agreement with the Company, USW commenced a lawful strike against the Company. The strike was authorized by a vote of the membership of Local 7326 and continued for over eighteen months, until July 14, 1978, at which time USWA was decertified by the National Labor Relations Board (NLRB) as the bargaining representative for the Company's employees on the basis of an NLRB election among the employees in which a majority voted to no longer be represented by USWA. Thereafter the union had no jurisdiction at the plant.

Article II of USWA's Constitution limits membership in USWA to persons who are "employed in . . . a[]

. . . place within the jurisdiction of the International Union." As a result of the decertification, the employees of the Company ceased to be represented by USWA and automatically ceased being eligible for membership in USWA (and in Local 7326). The employees perforce ceased being obligated to pay dues to USWA and, in fact, ceased paying union dues. USWA did not conduct formal proceedings, however, to expel each individual from the Union.[1]

In December 1979, seventeen months after USWA was decertified as the bargaining representative for the Company's employees, plaintiffs (respondents here) began to communicate with the union with respect to petitioners' (defendants') use of strike funds. The union turned the inquiry over to the United States Department of Labor (DOL).

On May 1, 1980, while the DOL investigation was pending,[2] plaintiffs commenced this action *(Erkins I)* against the alleged wrongdoers (petitioners Bryan, Comer, Bullard and Greene) seeking to recover for the benefit of USWA the strike fund money that plaintiffs alleged had been misused. Plaintiffs invoked § 501(b) (LMRDA) which, under certain conditions, authorizes a union member to sue derivatively on behalf of his union to recover union assets that have been diverted.

Because a § 501(a) action may be filed only with "leave of the court obtained upon verified application and

---

[1] In accordance with its standard procedure, USWA did take steps to wind up the affairs of Local 7326. Towards that end, USWA appointed an International representative as administrator of the local. The administrator removed the Local officers from their positions and took control of the Local's assets. Thereafter the Local became dormant. (See 663 F.2d 1048, 1050)

[2] The DOL investigation ended in November 1981 with the criminal indictment of petitioners. On February 26, 1982, petitioners were acquitted of all charges following a five-day jury trial. See Appendix C hereto.

for good cause shown," plaintiffs filed a verified complaint and an *ex parte* application seeking leave to proceed.[3] Plaintiffs' papers did not inform the court that USWA had turned the matter over to DOL for an investigation or that USWA had pledged to file a claim on its bond if any wrongdoing was uncovered by DOL. Based on the information before it, the district court granted plaintiffs' application on the same day it was filed.

In June 1980, USWA filed a motion to intervene for the limited purpose of challenging plaintiffs' right to maintain this action. In support of its challenge USWA argued that plaintiffs were not entitled to sue on USWA's or the Local's behalf under § 501(b) because, as a result of the decertification of USWA as the bargaining representative for the Company's employees, plaintiffs, along with all the other employees, were no longer members of USWA (or of Local 7326) and thus no longer had any interest in the union's recovery of monies.

Based upon the full adversarial record that had been developed as a result of USWA's participation, the district court found that plaintiffs "were not members of USW[A] when suit was filed" (*Erkins v. Bryan*, 494 F.Supp. 732, 735 (M.D.Ala. 1980), and concluded that accordingly they could not maintain this action under § 501(b):

> Plaintiffs concedde that since they are no longer union members they have no derivative interest in any recovery effected by them on behalf of the union.[4]
>
> . . . .

---

[3] Section 501(b) expressly authorizes the use of *ex parte* applications.

[4] The concession to which the court referred was made repeatedly during oral argument before the district court. When plaintiffs later denied that they had conceded that they were no longer members of the union, the district court quoted three such concessions in its opinion denying plaintiffs' motion for reconsideration. (494 F.Supp. 732, 737)

> The plaintiffs in the instant suit, therefore may be viewed as in the same position as a plaintiff who seeks to bring a shareholder derivaitve suit after he has sold his stock in the corporation. He may have owned his stock at the time of the alleged wrong, and he may have been derivatively injured by such wrong, but essential to his being allowed to bring the shareholder suit for the benefit of the corporation is that he be a shareholder at the time of filing suit. . . . A complete victory in this case by the plaintiffs will be of no tangible benefit, derivatively or otherwise. Conversely, the loss of this case will in no way be of any tangible detriment to them, derivatively or otherwise.

Erkins I, 494 F.Supp. at 736.

Plaintiffs appealed from the initial dismissal of this action *(Erkins I)* by the district court. While that appeal was pending in the Eleventh Circuit Court of Appeals, plaintiffs filed a second suit in equity against USWA *(Erkins II)*. The complaint in *Erkins II* again was that in the course of the strike union strike funds had been misused and that the union as such had thereby failed in its fiduciary duty to represent the union members. The second suit *(Erkins II)* relied in part upon the same alleged misuse of strike funds as had been asserted in the complaint here in *Erkins I*.[5] Both *Erkins I* and *II* are equitable proceedings.

"The *Erkins II* panel [CCA 11] applied the NLRA limitation for unfair labor practices" (785 F.2d at 1543) and affirmed dismissal of *Erkins II* as untimely under the six-months rule of 10(b) of NLRA and the principles of *DelCostello*.

On plaintiffs' appeal in *Erkins I* (the present case) the United States Court of Appeals for the Eleventh Circuit reversed. The opinion concluded that even though,

---

[5] Compare the allegations in *Erkins II* as described by the Circuit Court of Appeals, 723 F.2d 837.

under the USWA Constitution, plaintiffs no longer were eligible for membership in USWA and no longer were represented by USWA, plaintiffs were still "members" within the meaning of § 3(o) of the LMRDA, 29 U.S.C. § 402(o). Section 3(o) was construed to mean that an individual who at one time qualifies for union membership becomes a member for life unless, thereafter, "one of two events occur: the member voluntarily withdraws from the union or (2) the union expels or suspends the member after 'appropriate proceedings' held pursuant to lawful constitution or bylaw provisions" (*Erkins v. Bryan*, 663 F.2d 1048, 1051 (11th Cir. 1981). Since neither event had occurred with respect to plaintiffs, they were still, in the court's view, "members" entitled to institute a § 501(b) action on USWA's behalf (*Id.* at 1052).[6] The court of appeals accepted the district court's finding that plaintiffs had no derivative interest in any recovery by the union but concluded that "[i]t is . . . not necessary that the [plaintiffs] in such an action as this have any personal stake in the outcome of the litigation. If the petitioners are members [under § 3(o)], the law says they have the standing to conduct litigation' (*id.* at 1051).

---

[6] In its opinion as originally issued, the court of appeals had stated:

> The proof before the [district] court at the time of the hearing was that these petitioners *were still employees*, they had not voluntarily withdrawn from membership and they had not been expelled or suspended from membership. It is difficult to understand, therefore, how the International can contend that they were not "members" of the Local at the time the suit was filed.

Erkins, supra at 1051 (emph. supp.).

On rehearing, the court amended its opinion by deleting the underscored words because the court found that that statement "appears not to be supported by the evidence in the record" (663 F.2d 1048) (see App. D). The court did not otherwise modify its opinion.

USWA filed a petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit which these current petitioners supported, No. 82-270. However, certiorari was denied (459 U.S. 989 (1982)). Upon eventual remand to the district court, the district court held that this action was not subject to the six-months limitation period contained in § 10(b) of the National Labor Relations Act (in NLRA, 29 U.S.C. § 160(b)) and therefore refused to apply the holding of *DelCostello v. Int'l Bro. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983).

After five days of trial the district court entered a judgment on June 6, 1984 that USWA recover from petitioners the following amounts: Charlie Greene: $6,102.73; Arthur Comer: $3,206.41; George Bullard: $3,084.08; Billy Bryan: $2,068.08, and, bound by the prior 11th Circuit decision in this proceeding (663 F.2d 1048), reaffirmed the determination that plaintiffs had standing to sue derivatively on USWA's behalf even though USWA had been decertified, plaintiffs were no longer employed in a plant over which the union had representative jurisdiction and had no further interest in the union's recovery of money, and the Local had itself ceased to function. On November 27, 1984, the district court entered judgment for plaintiffs against petitioners for prejudgment interest and costs in amount of $3,123.99, and attorneys' fee in the sum of $42,000.00 against petitioners and USWA jointly.

On April 8, 1986, the United States court of Appeals for the Eleventh Circuit affirmed the judgment entered by the district court. (App. B)

REASONS FOR GRANTING THE WRIT

This case poses important questions of statutory construction.

A conflict has arisen between the Sixth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals

upon the important issue of the meaning of the term union "member" as used by Congress in the Landrum-Griffin Act.

I. Importance of the Issues Presented

The decision of the court of appeals that plaintiffs retained membership in the union since they had not technically resigned from the union and the union had not gone through the burdensome process of expelling them, gave no effect to the union's own constitutional requirements for retention of membership.

There is now precise authority to the contrary, signalling a conflict between circuit courts of appeal. *Taylor v. Great Lakes Seaman's Union*, 701 F.2d 590 (6th Cir. 1983).

The legislative history of LMRDA makes clear that Congress intended to confer rights only on those persons who satisfy the eligibility requirements established by the union for as long as they satisfy those requirements. Twelve years before enacting LMRDA, Congress, in the Labor-Management Relations Act of 1947, had expressly guaranteed "the right of a labor organization to prescribe its own rules with respect to the acquisition and *retention of membership* therein." 29 U.S.C. § 158(b)(1)(A) (emph.supp.). The debates over the LMRDA make clear that, in the words of Representative Landrum, one of the two co-sponsors of the Landrum-Griffin bill that became the LMRDA, Congress did "not here seek to repeal that. We do not here withdraw or take away from the unions the right to fix their own rules for the acquisition or *retention* of membership." [7]

Representative Griffin, the other co-sponsor of the bill, echoed this sentiment: "The labor reform legislation . . . does not touch or deal in any way the admission to, or

---

[7] 2 National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* at 1649 (1959) (emph.supp.)

retention of, membership in a union."[8] Indeed, to preserve union autonomy in this area, Congress even rejected proposals to prohibit discrimination by unions in determining who are union members.[9]

II. Application of § 10(b) of the NLRA

Under *DelCostello* and *Erkins II* (723 F.2d 837 (11th Cir. 1983)), the six-months limitation period contained in § 10(b) of the NLRA (29 U.S.C. § 160(b)), should apply to this action brought under LMRDA.

Plaintiffs' suit arises within the same "family" of claims and litigation as do claims under NLRA. Indeed, the kinship is sharp and defined, because LMRDA is actually an amendment to NLRA. And *Erkins I* and *II* are related aspects of a single underlying controversy arising from the same labor dispute.

The judgment below thus does not merely run counter to the Supreme Court's instruction that, in federal labor law, actions within the same "family" (see, 462 U.S. 151, 103 S.Ct. 2281, 2293) should have uniformly governing time limitations. That judgment results in an application of the six-months limitation of time, when actions of union officials are challenged in a suit for alleged breach of the duty of fair representation, but leaves those identical official actions open to challenge on alleged breach of the duties created by Title V indefinitely and for varying periods of time (*here twenty-two months*).

If, for example, one or more of these defendants lived in Georgia a few miles from Eufaula, Alabama—time

---

[8] *Ibid.*

[9] Such a proposal was made to the Senate Committee on Labor and Public Welfare by, e.g., Professor Archibald Cox, one of the committee's chief advisors, and by the American Civil Liberties Union; *see* Hearings on Union Financial and Administrative Practices and Procedures, 85th Cong., 2d Sess. 363, 1118 (1958); the Committee, however, did not incorporate this suggestion in the bill it reported out, S. 1555, 1 Leg. Hist. 338-96.

for suit against them, by the district court's reasoning, would be limited only by the judgment and discretion of another district judge.

There is precise authority that § 10(b) applies to actions brought pursuant to § 102 and § 609 LMRDA. *Local Union 1397, United Steelworkers v. United Steelworkers*, 748 F.2d 180 (3rd Cir. 1984).

Local Union 1397 affirmed a district court opinion which the court below refused to follow. That refusal, we respectfully submit was flawed. For as the Third Circuit spelled out:

> Whether an individual's dispute with his union concerns an "internal" matter, such as the freedom to speak against union leadership, or an "external" matter such as the processing of grievances, *every dispute implicates the responsibility that a union has for the economic welfare of its members.*

748 F.2d at 183 (emph. supp.).

The Eleventh Circuit Court of Appeals has itself held that a suit by an expelled union member alleging violation of rights protected under 29 U.S.C. § 411(a)(2), Title I, of LMRDA was barred by § 10(b) of the National Labor Relations Act. *Davis v. United Auto Aerospace & Agriculture Implement Workers of America*, 765 F.2d 1510 (11th Cir. 1985).

The present suit is thus brought under a portion of LMRDA (Title V) that in a sense lies between Title I and Title VI, both of which have been found by circuit courts of appeal to be governed by § 10(b). As matters have been left by the court below, an anomalous result has been achieved: actions brought under different sections of the same Act of Congress will be governed by different, varying and indefinite time limitations. The precise opposite of desired uniformity [10] will result—even with respect to identical underlying facts arising in a single labor dispute.

---

[10] *DelCostello, supra.*

In the wake of the decision below, uniformity in the area of labor law which the Congress has sought and which this Supreme Court has directed, is rent asunder. Limitations within which legal actions arising from a single labor dispute may be brought will vary according to residence of parties—views of differing trial judges—and the form of pleadings relating to identical operative facts (e.g., failure to represent complaints—or complaints under Title V of LMRDA).

Plaintiffs' claims are clearly time-barred if the limitations of § 10(b) be applied.

Plaintiffs voiced their alleged concerns almost two years before suit was filed (*Erkins v. Bryan*, 598 F. Supp. 240, 242 (M.D. Ala. 1984)). They sought counsel to file suit approximately one year before suit was filed but "were unable to meet the fee demand" of proposed counsel. *Id.* Admittedly, *Erkins I* is related to *Erkins II*. In *Erkins II* the district court found that the undisputed evidence established that the plaintiffs had some knowledge of the alleged breach of the duty of fair representation (which was indissoluably involved with allegations of misuse of strike funds) shortly after the strike ended in July 1978. Accordingly, the district court held (prior to *DelCostello*) that since plaintiffs were on notice of their alleged complaints in July 1978, *Erkins II* was even time-barred by application of Alabama's *one-year* statute of limitations. Plaintiffs appealed and the Eleventh Circuit Court of Appeals affirmed (following *DelCostello*) (723 F.2d 837 (11th Cir. 1984)). Indeed, in the very decision of the Eleventh Circuit presently under review, that court noted "soon after the strike ended [July 1978] plaintiffs challenged the propriety of these [challenged] payments . . . ." (785 F.2d 1538, 1541).

A. *Under Section 501(b) of the LMRDA Plaintiffs Are Not Entitled to an Award of Attorneys' Fees in Excess of the Monetary Recovery Where, as Here, the Only Element of Recovery is a Money Judgment*

The pertinent portion of Section 501(b) provides as follows:

> The trial judge may allot a reasonable *part of the recovery* in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation. (emph. supp.)

The legislative history of § 501(b) confirms what Congress meant. The section was first adopted by the Senate, 104 Cong. Rec. at 11329, as the result of an amendment offered by Senator Ervin during the Senate's consideration in 1958 of the "Kennedy-Ives Bill," the precursor of the bill that became the LMRDA, see *Trbovich v. Mine Workers*, 404 U.S. 528, 533 (1972). The Ervin Amendment contained an attorneys fee provision identical to that which was eventually enacted in § 501(b) one year later. Senator Ervin explained that under its provisions, "[i]n the event of a recovery, the trial judge may order a reasonable portion of the recovery to be used to pay the fees of counsel represnting the member of the union who brought the suit . . . ." 104 Cong. Rec. at 11327. Senator Javits elaborated upon this principle:

> We are very well acquainted with the cases of stockholders who, under similar situations, might sue to recover funds misapplied by an officer, a director, or an employee of a corporation, when the corporation fails or refuses to sue. The way in which a stockholder can get counsel fees is that the *amount recovered then becomes a fund out of which counsel may be paid.* So there is an automatic, built-in means for inducing competent lawyers to undertake

> this kind of litigation. *Our colleague provides exactly that in the amendment.*

Id. at 11329 (emph. supp.).

The Senate eventually approved the Kennedy-Ervin bill without changing the attorneys fee provisions, 2 *Leg. Hist. of the LMRDA* at 1257 (NLRB 1959). And the Landrum-Griffin bill in its form as passed contained the Ervin language with respect to fee awards.

After the bill was passed Professor Cox, who had served as a key advisor to Senator Kennedy during the bill's consideration, 2 Leg. Hist. at 1025, wrote that under § 501(b) "the trial judge may allot part of *any sums recovered* for counsel fees and expenses." Cox, *supra*, n.4, at 828.

Congress did not intend Title V of the LMRA to become a "relief fund for lawyers." 122 Cong. Rec. 33, 314 (remarks of Senator Kennedy) with respect to § 1988, 42 U.S.C. § 1988.[11]

Much of plaintiffs' attorneys' work was unsuccessful. They obtained judgment for only approximately 10% of what they initially alleged was due. They spent time and effort (and expense) in having a groundless federal criminal suit brought against defendants. The jury found defendants innocent. Every reason in logic and in equity exists here to apply only the direction of Congress that in such a suit as this attorneys' fees and expenses may only be allowed as "part of any *sums recovered*" (emph. supp.).

---

[11] The fee in this case should not be determined as one to reward adventuresome counsel who undertake litigation on a contingent basis. Plaintiffs' counsel refused to take the case when first contacted by plaintiffs, and did not undertake it until his financial demand had been satisfied. That demand was for $10,000 retainer.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

JEROME A. COOPER
(Counsel of Record)
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576
Attorney for Petitioners

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
M.D. ALABAMA, N.D.

Civ. A. No. 80-180-N

ELBERT ERKINS and SAMUEL DENSON,
Plaintiffs,

v.

BILLY BRYAN, and ARTHUR COMER, and
GEORGE BULLARD, and CHARLIE GREENE,

Nov. 27, 1984

William I. Grubb, II, Eufaula, Ala., Thomas M. Jacobson, Milwaukee, Wis., Walter Kelly, Milwaukee, Wis., for plaintiffs.

Jerome A. Cooper, Birmingham, Ala., for defendants.

MEMORANDUM OPINION

HOBBS, District Judge.

This action was commenced under Section 501(b) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 501 (1975), by two members of Local 7326, United Steelworkers of America, against defendants Billy Bryan, George Bullard, Arthur Comer, and Charlie Greene. Plaintiffs alleged that said defend-

ants breached their fiduciary duties owed to Local 7326 by misappropriating strike funds for their own personal benefit in violation of 29 U.S.C. § 501(a). After conducting a three day trial without a jury, the Court concluded that the union was entitled to reimbursement from the defendants in the amount of $14,461.30, plus costs and interest.

This cause is now before the Court on the motion of plaintiffs for an award of attorneys' fees. Plaintiffs' attorneys contend that they are entitled to $305,381.25 as compensation for the services rendered to their clients in this law suit. Under LMRDA, 29 U.S.C. § 501(b), plaintiffs seek to recover these fees jointly and severally from defendants and from the United Steelworkers of America. The Court has reviewed plaintiffs' motion, accompanied by the time sheets of plaintiffs' attorneys and supporting affidavits, in light of the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and in light of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Consideration of these decisions, together with the facts of the instant case, leads the Court to conclude that plaintiff's are entitled to $42,000.00 in attorneys' fees.

I. *Factual Background*

Elbert Erkins and Samuel Denson, plaintiffs in the above-styled action, were rank and file members of the United Steelworkers of America (International) and of its affiliate, Local 7326. Defendants Billy Bryan, George Bullard, Arthur Comer, and Charlie Green were also members of the International and Local 7326. During the relevant times herein, each defendant occupied at one time or another a position of fiduciary responsibility in Local 7326.

From December 1976 through May 1978, approximately three hundred members of Local 7326 engaged in a strike against their employer, the American Buildings

Company of Eufaula, Alabama. This strike commenced at the expiration of the employment agreement between Local 7326 and the company. It was prompted by the company's demand for new terms in the collective bargaining agreement.

During the eighteen month strike, the International sent a total of $450,000 to the union local, along with instructions that the money be deposited into a special checking account which would contain only strike and defense funds. In order to qualify for benefits from this fund, a striker was required to perform for the union, which usually meant walking a shift at the picket line. In return he would receive a weekly benefit of twenty (later thirty) dollars. A striker could also petition the strike committee to obtain money from the fund to pay bills or other obligations. To obtain this additional assistance, the striker would have to demonstrate an urgent need. The members of the union were instructed at the outset of the strike to exhaust their own financial resources and seek alternative sources of income (e.g., unemployment compensation) before petitioning the committee for assistance. During the course of the strike, literally hundreds of union members' bills were paid from the strike funds.

Despite vigorous efforts by the union, the strike was lost when the employees voted not to be represented by the union at a decertification election. The results of this election became final when the union's objections to the decertification election were rejected by the National Labor Relations Board.

After losing the decertification election, Local 7326 was no longer authorized to represent the employees at the company's Eufaula plant. Since Local 7326 did not serve as the bargaining representative for employees of any other employer, a representative of the International was appointed as administrator to conclude the affairs of Local 7326. Following his appointment, Local 7326 ceased

to exist for all practical purposes. Funds which were not expended during the strike or during the period when the local's affairs were being concluded by the administrator were eventually returned to the International.

Shortly after the conclusion of the strike, plaintiffs and other union members met with the administrator to discuss whether any of the defendants had misappropriated strike funds. Following this meeting plaintiffs remained suspicious that strike funds had been wrongly appropriated by defendants. They decided to conduct their own investigation. They traveled to Milwaukee, Wisconsin in June 1979 to secure the assistance of Mr. Thomas Jacobson, an attorney. At first plaintiffs were unable to meet the fee demands of Mr. Jacobson. However, they returned in October 1979 with sufficient funds to retain him. After travelling to Eufaula and conducting his own investigation, Mr. Jacobson discovered sufficient information to warrant contacting the International and demanding that the union file suit against the defendants. The International refused and instead forwarded the information provided to it by Mr. Jacobson to the Department of Labor for its consideration.

On May 1, 1980, plaintiffs sought leave from this Court to file suit against defendants under Section 501(b). In their verified proposed complaint, plaintiffs asserted that defendants committed numerous violations of their fiduciary obligations as officers or representatives of Local Union 7326. The verified proposed complaint requested an accounting and reimbursement of any misappropriated strike funds. The Court heard testimony from the plaintiffs and determined that the good cause requirement of Section 501(b) had been satisfied. The Court also found that plaintiffs had satisfied the statutory requirement of making a demand upon the International to bring suit against defendants. Because the International had refused to sue the defendants, this Court allowed plaintiffs to proceed with their complaint.

On June 12, 1980, the International filed a motion to intervene in this lawsuit for the special purpose of seeking to vacate this Court's order allowing plaintiffs to commence this action. The Court allowed the International to intervene for this limited purpose. When at a hearing plaintiffs, through their attorney, conceded that they were not union members at the time suit was filed, this Court held that plaintiffs lacked standing to bring this suit, and, therefore, withdrew its leave to file suit. 494 F. Supp. 732. Plaintiffs appealed, and the Court of Appeals reversed, holding that plaintiffs remained "members" of the union within the meaning of Section 501(b). *Erkins v. Bryan*, 663 F.2d 1048 (11th Cir. 1981), *cert. denied*, 459 U.S. 989, 103 S.Ct. 343, 74 L.Ed.2d 384 (1982).

Plaintiffs also sought to bring a class action alleging that the union breached its duty of fair representation. This Court held such suit was time barred. Plaintiffs appealed to the Court of Appeals, which affirmed this ruling. Plaintiffs also were instrumental in having a federal suit brought against these same defendants for criminal conversion. After a lengthy trial, the defendants were acquitted of the criminal charges by a jury verdict.

After the conclusion of the criminal case, plaintiffs presented evidence in this civil suit over the course of three days regarding the travel expenses, strike benefits, and paymnts for personal expenses that defendants had received from the strike and defense fund. Out of the $450,000 allotted for the three hundred members of Local 7326, the four defendants received thirty-one percent of the funds, or $140,000.

It is undisputed, however, that the four defendants remained as leaders of the strike for substantially its entire duration of eighteen months. Their duties as leaders of the strike precluded them from obtaining other work, whereas most of the other union members obtained other

jobs within a few weeks or months of the beginning of the strike. Moreover, all of the defendants made many trips to other states in aid of the strike, and much of the money which they received from the defense fund was by way of reimbursement for such travel expenses.

The documentation presented by plaintiffs to substantiate charges of abuse and mismanagement by defendants included over two hundred checks that plaintiffs had selected to challenge as having been issued to one or more of the defendants in breach of their fiduciary duty. The Court notes that in order to secure this judgment against defendants, plaintiffs had to overcome difficult legal and factual obstacles that arose during the course of this protracted litigation.

II. *Attorneys' Fees*

A. *Extent of Union Liability*

A threshold question for this Court to consider in arriving at a reasonable figure for attorneys' fees is whether the Court will allow plaintiffs' award to exceed their recovery in the case. The question is an important one in a case where plaintiffs claim attorneys' fees of $305,387.25, and their judgment amounted to only $14,461.30.

The statutory provisions governing attorneys' fees in actions brought under the Labor-Management Reporting and Disclosure Act is § 501(b) of the Act. This section provides that a trial judge

> may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

29 U.S.C. § 501(b). The International interprets this section to mean that the amount recovered by plaintiffs

becomes the fund out of which the Court may allot "a reasonable part" as attorneys' fees, so that the fees can never exceed the recovery. The union argues that the legislative history supports its position. Moreover, the union argues that plaintiffs are seeking to impose on the union the obligation to pay hundreds of thousands of dollars in a law suit where it is not even a party. Its only participation has been by way of limited intervention (1) to oppose the bringing of the law suit for its alleged use and benefits, and (2) to oppose plaintiffs' efforts to collect staggering attorney fees from the union.

Plaintiffs argue that so restrictive an interpretation of the LMRDA provisions does not take the Act's broad purposes into account. LMRDA establishes fiduciary obligations for union officers who occupy positions of trust in a labor organization. 29 U.S.C. § 501(a). When these duties are violated, the Act provides criminal penalties for those who embezzle union funds. § 501(c). It also allows members of the union to file a civil suit for an accounting of union assets. § 501(b). Congress, in enacting LMRDA, remarked that

> A union treasury should not be managed as the private property of union officers, however well intentioned, but as a fund governed by fiduciary standards appropriate to this type of organization. The members who are the real owners of the money and property of the organization are entitled to a full accounting of all transactions involving their property.

Senate Comm. on Labor and Public Welfare, Labor-Management Reporting and Disclosure Act of 1959, S.Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2324.

Whatever may be the merits of the proper interpretation of the intention of Congress, courts have consistently rejected the unions' contentions that counsel fees should

be limited to the amount of the monetary recovery. *Local No. 92 v. Norris*, 383 F.2d 735, 742 (5th Cir.1967); *Bakery and Confectionery Workers Int'l v. Ratner*, 335 F.2d 691 (D.C.Cir.1964); *Highway Truck Drivers & Helpers Local 107 v. Cohen*, 220 F.Supp. 735 (E.D.Pa. 1963). Awards have been based on the theory that the union has benefitted from the results of the litigation initiated by plaintiff. Under this theory, the benefits of the litigation may accrue to unions that were not formal parties in the case, and may exceed the monetary recovery in cases where plaintiffs obtained a favorable, non-monetary benefit for the union. *Id.* In no case, however, has the claim for attorney fees been so disproportionate to plaintiff's potential or actual recovery as in the instant case.

In *Bakery and Confectionery Workers Int'l v. Ratner*, 335 F.2d 691 (D.C.Cir. 1964), for example, the court referred to "the establishment of proper accounting procedures, the calling of a convention for membership expression and control, and the requirement of conformity by the officers with the International constitution" as possible benefits for the Bakery and Confectionery Workers that would merit an award of counsel fees. The monetary recovery, observed the court, may constitute a source for the payment of counsel fees, but the recovery is not the exclusive source for these fees. 335 F.2d at 696-97.

In the present case, the Court is of the opinion that plaintiffs conferred some benefit upon the union which is in excess of their monetary recovery. This lawsuit benefitted the International in two respects. First, it demonstrated to the union that the International's elaborate system for controlling expenditures of its general funds [see Declaration of Thomas Striegel] existed only on paper in regard to Local 7326. Defendants administered over $450,000 of union funds, but did not maintain adequate records of their expenditures, and misappropriated $14,461.30.

Second, the case pointed out the need for union officials to take their fiduciary obligations seriously, and vigorously to investigate charges of wrongdoing by local officials. Before plaintiffs instituted this action, they met with union officials and asked them to investigate plaintiffs' charges that defendants had abused their positions of trust in the local union. The International seemingly refused to investigate, and at all events refused to file suit against defendants, electing to forward the information it had received from plaintiffs to the Department of Labor. There is every reason to believe that if the International had elected to conduct its own internal investigation of the local and to file suit, the same results achieved by plaintiffs could have been attained at much less cost than the cost claimed by plaintiffs. To the extent, however, that the International allows itself to be put in a position where third parties enforce its fiduciary obligations and investigate charges against local officers, judicial decisions binding on this Court require that the International must be prepared to pay for all or a part of this outside help, even if the costs exceed the monetary recovery.

B. *Determination of Fee Award*

Having decided that plaintiff's attorneys are entitled to an award of fees, the Court must now determine the amount that counsel should receive. Plaintiffs have the burden of proving to the Court that they are entitled to an award of attorneys' fees. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974). They have submitted affidavits and time sheets in support of their claim that they should receive the sum of $305,381.25. Plaintiffs arrive at this figure by multiplying the hours that three of plaintiff's attorneys worked on this matter times the hourly rate for each attorney. This results in a total of $203,587.50. Plaintiffs then increase this figure by a factor of fifty percent, a fee enhancement that plaintiffs claim is appropriate in this case.

In evaluating plaintiff's motion, the Court has paid particular attention to *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974). *Hensley* teaches that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." 103 S.Ct. at 1939.

The figures that plaintiffs have submitted to the Court on this issue are as follows:

Thomas M. Jacobson (1045.50 hrs at $125)	$130,687.50
Thomas M. Jacobson (travel, 93 hrs at $25)	2,325.00
Walter F. Kelly (483 hrs at $125)	60,375.00
William I. Grubb (127.50 hrs at $80)	10,200.00
TOTAL (without 50% enhancement)	$203,587.50

Plaintiffs have also included itemizations of the time that counsel have spent on this case, along with supporting affidavits from local attorneys regarding plaintiffs' hourly rates. In these affidavits, the attorneys state their belief that plaintiffs' request are reasonable and the local attorneys charge anywhere from $75 to $200 per hour for services similar to those performed by plaintiffs' counsel.

The Court believes that counteraffidavits and discovery could possibly form the basis for challenging whether all of counsel's time was reasonably spent, but this Court is mindful of the Supreme Court's admonition in *Hensley* not to turn the attorney fee petition into a second major trial. Already the time claimed for the fees of plaintiffs' attorneys is many times the amount in controversy. Accordingly, this Court will review plaintiffs' submissions in light of the Court's experience as a member of the local bar for approximately thirty years and as one who

routinely has set fees for lawyers in litigation in this Court for the past several years, taking such aid as the affidavits filed by the parties afford.

The Court is of the opinion that if the only consideration in setting fees in this case is the number of hours reasonably spent by plaintiffs' attorneys times an appropriate hourly rate, plaintiffs would be entitled to an hourly rate of $90 per hour. Fees awarded by this Court have ranged from $40 an hour for beginning attorneys to as much as $100 an hour in a contingent fee case with excellent results for a skillful, prevailing attorney. This Court recognizes that plaintiffs were represented by able, dedicated attorneys.

After reviewing counsel's itemizations, the Court believes that some of the time listed was unnecessary, duplicative or poorly documented. For example, plaintiff had three attorneys present throughout the trial; defendants had one. But defendants are asked to pay for lawyers for their adversaries which clearly they could not have afforded for themselves. This Court recognizes that three attorneys at a trial may be helpful, but this Court has held that such a luxury as even two counsel at a trial should not be paid for by the losing party where defendants were represented by only one attorney—particularly is this true where defendants have very limited resources. *Joyner v. AAA Cooper Transportation Co.*, CA No. 82-884-N (M.D.Ala. Mar. 8, 1984), and see *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717 (5th Cir.1974). This Court is satisfied that much of the work of the attorneys outside the courtroom was also duplicative even where the attorneys sought to limit the amount of duplicative work.

A careful scrutiny might afford a basis for challenging some of the hours claimed on a basis other than duplicative hours. For example, the record of Mr. Kelly is itemized entirely in one hour increments, and the accompanying explanation in some cases does not seem to jus-

tify the amount of time claimed. But this Court is satisfied that the attorneys for plaintiffs have spent hundreds of hours productively on this case. If the amount in controversy and the results achieved justified fees based on the simple arithmetic of multiplying hours productively employed, times a reasonable hourly rate for plaintiffs' attorneys, the Court would conclude that the fee should be no less than $95,000 to $100,000. The Court has reduced the amount that plaintiffs may require the union and/or the defendants to pay for plaintiffs' attorneys based on the results obtained and the amount in controversy.

Johnson v. Georgia Highway Express, 488 F.2d at 717, notes the factors that should be considered by the district court in arriving at an appropriate fee.

(1) *Time and labor required:* The Court has concluded that plaintiffs' attorneys spent more time than was reasonably required to prosecute this case successfully, but that plaintiffs' attorneys spent a thousand or more productive hours in representing their clients.

(2) *The novelty and difficulty of the questions:* The case presented a novel question on the issue of standing that was resolved in favor of plaintiffs on appeal. *Erkins v. Bryan*, 663 F.2d 1048 (11th Cir.1981). In addition, plaintiffs' proof depended on the difficult chore of assembling and reviewing numerous checks in an effort to make sense out of the Local's chaotic financial records. Beyond the complexities of the accounting, the trial itself represented no novel or difficult questions.

(3) *The skill requisite to perform the legal service properly:* Attorneys for plaintiff demonstrated skill and tenacity in persevering in the representation of their clients, despite many obstacles which they had to overcome.

(4) *The preclusion of other employment by the attorney due to acceptance of the case.* Counsel's representa-

tion of plaintiffs did not create any conflicts of interest which hindered their ability to represent other clients, nor did it impose upon the time of attorneys involved to an unusual degree.

(5) *The customary fee.* The Court has answered this question in its discussion of an appropriate hourly rate.

(6) *Whether the fee is fixed or contingent.* The *Johnson* court employs this variable as an aid to the Court "in demonstrating the attorney's fee expectations when he accepted the case." 488 F.2d at 718. Plaintiffs have asked the Court to view the fee as contingent and add 50 percent to a generous hourly rate by way of enhancement. The Court recognizes some merit in the argument of plaintiff's counsel that the $10,000 retainer fee (which, counsel inform the Court, was spent on expenses) should not alter the substantial contingent nature of the fee agreement in this case. A case in which an attorney is paid ten thousand dollars as a retainer is not entirely contingent, but in view of the hundreds of hours expended by plaintiffs' attorneys, the ten thousand dollars was clearly inadequate payment and the representation should invoke consideration similar to a contingent fee case. *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C.Cir. 1980) (en banc).

(7) *Time limitations imposed by the client or the circumstances.* The Court is not aware of any unusual time constraints in this matter.

(8) *The amount involved and the results obtained.* The Court is of the opinion that, considering the amount involved, no attorney could reasonably have believed that he would be entitled to a $300,000 fee in this case if his own client were paying the bill. The total amount of money received by all defendants from the strike fund was $140,000. Plaintiffs realized from the start that defendants were entitled to a large part of this money for work they performed during the strike and for ur-

gent expenses which were paid for them as for other union members. The maximum possible recovery for plaintiffs at the outset of the trial was in the area of $50,000.00.

Plaintiffs' attorneys might well have anticipated that they would expose mismanagement in the union, which would benefit the International, and serve as additional justification for the suit. The level of mismanagement, however, was directly related to the amount of funds misused by defendants. In this respect, plaintiffs should have been alerted that the amount of their attorney fees involving three attorneys with two of them from more than a thousand miles distance from the trial, was out of all proportion to the potential recovery.

Admittedly, plaintiffs had difficulty in marshalling the evidence to prove their case in large part because of the inadequate records and memories of defendants. Nevertheless, if the maximum possible recovery was somewhere in the area of $50,000, the actual results obtained, $14,-461.30, were a good deal less.

If plaintiff succeeded on some of his claims, but failed to succeed on others, the time spent pursuing the unsuccessful claims is not compensable if the unsuccessful claims are not related to the successful ones. *Hensley*, 103 S.Ct. at 1940. On the issue of whether plaintiffs' claims were related, the Court will treat all claims as related. None of plaintiffs' time will be disallowed for unsuccessfully pursuing an unrelated claim.

(9) *The experience, reputation, and ability of the attorneys.* The quality of counsel's representation has already been noted in determining an appropriate hourly rate. This Court recognizes that plaintiffs were represented by able, dedicated attorneys.

(10) *The "undesirability" of the case.* The Court does not believe that counsel will suffer economic hardship resulting from their representation of plaintiffs in this

matter, or that the case was "undesirable" except for the length of time from the filing of the suit to its conclusion and the travel involved for all of plaintiffs' attorneys.

(11) *The nature and length of the professional relationship with the client.* Plaintiffs' attorneys did not have a prior relationship with their clients.

(12) *Awards in similar cases.* Judgments in two similar cases have been roughly equivalent to plaintiffs' monetary judgment. In *Local No. 92 v. Norris*, 383 F.2d 735 (5th Cir.1967), plaintiffs obtained a judgment of $22,896.01, and received attorneys' fees of $15,729.47. In *Highway Truck Drivers v. Cohen*, 220 F.Supp. 735 (E.D.Pa.1963), plaintiff received a verdict of $24,921.44, and $38,000.00 in attorneys' fees.

The twelve factors listed above are not accorded equal weight in arriving at a reasonable fee. Under *Hensley*, "the most critical factor" used in evaluating the product of the attorneys' reasonable hours times a reasonable rate is the results obtained by plaintiff. 103 S.Ct. at 1941. In this case, the fee award has been primarily influenced by the fact that plaintiffs did not achieve a level of success that would make the hours reasonably expended a satisfactory basis for making the fee award. *Id.* at 1940. The Court in *Hensley* noted that where "plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." 103 S.Ct. at 1941.

For example, in *Earl v. Bealieu*, 620 F.2d 101 (5th Cir.1980), a Truth-in-Lending Act case, plaintiff's recovery was $220, and plaintiff sought, $1,020 for plaintiff's attorney fees. The court in *Earl* limited the attorney fees to the amount of the recovery; i.e., $220. The court emphasized that the basis for so limited an award

was "the amount involved and the results obtained." *Id.* at 103.

In cases such as this one, where the fee awarded exceeds the amount of the judgment, the Court believes that there should be a relationship between the two. In *Pearson v. Colonial Financial Services, Inc.*, 530 F.Supp. 599 (1982), a case brought before this Court, plaintiff sought attorneys' fees from the losing party which were fifteen times her recovery. Plaintiff received an award of attorney fees in excess of her judgment, but this award was for $6,000 in fees to plaintiff's attorneys rather than the $31,594.00 which had been sought. In rejecting most of plaintiff's claim for attorney fees, this Court made it clear that the primary reason was that the claimed fee was out of proportion to the amount in controversy and to the results obtained. *Id.* at 602.

In the present case, the union has made a strong argument based on legislative history that the union cannot be required to pay a fee in excess of the amount recovered. Judicial precedent deemed binding on this Court has held that the union can be required to pay in excess of the amount of the judgment. The Court notes, however, that plaintiffs are seeking attorneys' fees and costs which are more than twenty times the amount of the judgment. These fees and costs are $290,000.00 greater than the monetary benefit to the union, in a case that was allegedly brought for its benefit.

In ruling on plaintiff's petition, this Court has tried to establish a correlation between the amount of the judgment and the amount awarded for attorneys' fees. If no such correlation is required, the fee to be awarded could become a devastating weapon with which to bludgeon settlements. 530 F.Supp. at 601. In a hypothetical case, an attorney could demand that a union pursue a claim against a former officer of a defunct local union. The union may know that the former officer is insolvent. It may also know that it would cost far, far more to pursue

the claim than the claim is worth. Nevertheless, the union must sue the former union officer over even trivial amounts. This could hardly have been the intent of Congress, nor would it be in the public interest.

After a review of the legislative history of LMRDA, this Court has found no indication that Congress, in allowing third parties to enforce the fiduciary obligations of union officials, intended that these parties should hold such a club to coerce decisions of a labor organization. The union should be allowed to exercise its own judgment regarding the merits of a suit without the fear of being forced to pay staggeringly large attorneys' fees which are not related to the expected recovery. In light of these considerations, the Court will order, by separate judgment, that defendants and the union are jointly liable for attorneys' fees to plaintiffs in the amount of $42,000.00.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 84-7455, 84-7774

ELBERT ERKINS and SAMUEL DENSON,
Plaintiffs-Appellees,
Cross-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellants,
Cross-Appellees,

UNITED STATES FIDELITY & GUARANTY CORP.,
Defendant-Cross-Appellee.

ELBERT ERKINS and SAMUEL DENSON,
Plaintiffs-Appellees,
Cross-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellants,
Cross-Appellees,

U.S. FIDELITY & GUARANTY CORP.,
Defendant,

UNITED STEELWORKERS OF AMERICA,
Defendant-Appellant,
Cross-Appellee.

April 8, 1986

Appeals from the United States District Court
for the Middle District of Alabama

Before HILL and CLARK, Circuit Judges, and MOYE *, Chief District Judge.

CLARK, Circuit Judge:

All parties below have appealed from the district court decision in this suit for an accounting of union funds under § 501 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 501(a), (b). Elbert Erkins and Samuel Denson, plaintiffs below, were members of Local 7326 (Local), United Steelworkers of America (USW), when the Local struck plaintiffs' employer, American Building Co. in Eufaula, Alabama. The strike lasted from December, 1976 until May, 1978, when employees voted to decertify USW as their bargaining representative. During the course of the strike, USW provided the Local with a strike fund of $405,000. Billy Bryan, Arthur Comer, George Bullard and Charlie Greene, defendants below, were either Local officials or prominently involved in directing picketing and other strike efforts. Together, these four individuals received $140,000 from the strike fund in payment for various expenses incurred on behalf of the Local.

Soon after the strike ended, plaintiffs challenged the propriety of these payments, especially in view of the fact that defendants had acquired significant items of personal property during and after the strike while many

---

* Honorable Charles A. Moye, Jr., Chief U.S. District Judge for the Northern District of Georgia, sitting by designation.

other union members were struggling just to meet household expenses. Plaintiffs investigated the use of strike funds by defendants and in January, 1980, they requested that USW bring suit against defendants for misapplication of union funds. When USW instead referred the case to the Department of Labor, plaintiffs sought leave to bring suit on behalf of the union in federal court. Leave was granted and suit was filed on May 1, 1980, two years after the end of the strike.

In their suit, plaintiffs sought recovery of the $140,000 in payments, either from the individual defendants or from their indemnitor, United States Fidelity and Guaranty Corporation (USF & G). In addition, plaintiffs requested an award of $305,000 in attorney's fees, payable by the defendants or intervenor, USW. After a three day non-jury trial, the district court ordered a recovery of $14,461.30 from the individual defendants, payable to USW. The court held that plaintiffs' delay in joining USF & G had discharged the indemnitor from any liability under the bond, and recovery could be had only from the individuals. In a separate order, the court awarded plaintiffs $52,000 in attorney's fees, payable by USW. 598 F. Supp. 240.

The parties present the following issues on appeal. Defendants argue that the district court erred in finding plaintiffs had standing to sue as union "members" under § 501(b) of LMRDA. Defendants contend that the statutory definition of union "member" must yield to each union's definition of membership and plaintiffs would not be considered members by USW standards. Alternatively, defendants urge that this suit is time barred under recent Supreme Court precedent applying a six-month statute of limitations to cases brought under federal labor law. Intervenor USW joins in defendants' arguments and furthermore contests the order to pay $42,000 in attorney's fees. USW contends that the district court's use of the common benefit theory of fee awards is clearly at odds with the language and legislative history of § 501(b),

which limits fee awards to the amount of money recovered in an accounting suit (here only $14,461.30).

Plaintiffs for their part assert error in the district court's order to recover only $14,461.30. Plaintiffs contend that the district court arbitrarily approved numerous payments not properly accounted for by defendants; thus, they request a judgment for the full $140,000 paid to defendants. Furthermore, plaintiffs contend that USF & G was erroneously found discharged from the fidelity bond since USF & G did not prove prejudice from the delay in being joined as a defendant. Lastly, plaintiffs' attorneys argue that the district court erroneously awarded only 12% of their requested fee by arbitrarily reducing the number of hours billed, the hourly rate and eliminating the contingency factor.

We affirm the district court order and thus, reject all these contentions.

I. *Plaintiffs' Standing Under § 501*

Section 501(a) provides that "the officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is therefore, the duty of each such person . . . to hold [the organization's] money and property solely for the benefit of the organization and its members." 29 U.S.C. § 501(a). Section 501(b) provides that "any member of the labor organization" may sue a defaulting union officer in federal court "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. § 501(b). Defendants argue that plaintiffs were not members of USW at the time of suit and therefore cannot sue for an accounting. Our consideration of this issue is foreclosed by the decision of a prior panel in an interlocutory appeal in this case. *See Erkins v. Bryan*, 663 F.2d 1048 (11th Cir. 1981) (*Erkins I*). That panel held that plaintiffs were USW members at the

time of filing suit and thus had standing to sue. Since findings of fact and conclusions of law by an appellate court bind all subsequent proceedings on the same case, absent exceptional circumstances, we find that plaintiffs have standing. *See Westbrook v. Zant*, 743 F.2d 764, 768 (11th Cir. 1984).

II. *Statute of Limitations for § 501 Accounting*

Defendants assert that the district court erred in refusing to apply the six-month statute of limitations of the National Labor Relations Act (NLRA) to the present action. Neither § 501 nor the LMRDA specifically provide a period of limitations. When confronted with such legislative omissions, federal courts ordinarily adopt the most analogous state statute of limitations. An exception to this rule occurs when state law would contradict the purposes of the federal law or policy at issue; in that case, courts look to related federal statutes or doctrines. *See UAW v. Hoosier Corp.*, 383 U.S. 696, 703-704, 86 S.Ct. 1107, 1111-1112, 16 L.Ed.2d 192 (1966). Defendants urge that the recent Supreme Court decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 51, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), requires this court to apply the NLRA statute of limitations in this case.

DelCostello involved a hybrid action brought under federal labor law by a disgruntled union member against his employer for breach of the collective bargaining agreement and against the union for breach of its duty of fair representation. The suit against the employer was brought under § 301 of the National Labor Relations Act, 29 U.S.C. § 185. The suit against the union was brought as an unfair representation claim pursuant to 29 U.S.C. § 158(b). The Supreme Court selected a federal rather than state limitation for the case based upon several considerations: the Court found no closely analogous state limitations; federal labor policy in this context re-

quired particularly prompt resolution; and the interplay of hybrid claims, one part (the unfair labor practice claim) having an extremely short express federal limitation (6 months under § 10, 29 U.S.C. § 160(b)), argued for a single federal limitation when combined. *See* 462 U.S. at 171, 103 S.Ct. at 2294. Thus, the Court applied the six-month limitation normally applicable to unfair labor practices, *see* 29 U.S.C. § 160(b), and emphasized that such a result properly balances "the national interest in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system." 462 U.S. at 171, 103 S.Ct. at 2294 (quoting *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981)). The Supreme Court noted, however, that nothing in the *DelCostello* analysis should upset the traditional rule of *UAW v. Hoosier, supra. See* 462 U.S. at 171, 103 S.Ct. at 2294.

In this circuit, the rationale of *DelCostello* has been applied in two contexts other than a hybrid action, and defendants argue that these cases should control our decision here. The first such case is *Erkins v. United Steelworkers*, 723 F.2d 837 (11th Cir. 1984) (*Erkins II*), a pure breach of fair representation claim brought by the instant plaintiffs and based on the failure of the union to negotiate with the employer during the strike which spawned the present case. The *Erkins II* panel applied the NLRA limitation for unfair labor practices because a fair representation claim bears a close resemblance to an unfair practice and thus implicates the very balance of interests at issue in *DelCostello. See* 723 F.2d at 838-39.

Following *Erkins II*, another panel relied on *DelCostello* in *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985). *Davis* involved abuse of free speech rights protected by 29 U.S.C. § 411(a)(2), part of the "Bill of Rights of

Members of Labor Organizations." The panel noted that the *DelCostello* analysis did not compel the use of the NLRA limitation because free speech claims do not implicate the collective bargaining structure as do unfair practices and thus, do not require uniform limitations or expedited resolution. *See* 765 F.2d at 1514. Rather, the panel found that the expulsion of the plaintiffs from the union was based upon friction between the local union and the international union which threatened stable bargaining relationships between the international union and the steel industry. Referring to *DelCostello*, the panel opinion stated: "We believe we are bound to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members by the denial of statutorily protected rights." *Id.* at 1514. Further, the panel found no analogous state cause of action.

The cause of action under consideration here is quite different from those described and we conclude that the limitation period for filing a § 501 action is not governed by *DelCostello*, *Erkins II*, or *Davis*. Plaintiffs in this lawsuit sought an accounting for union funds allegedly diverted to personal use by the individual defendants. There is no claim against a union or an employer. Consequently, neither the collective bargaining process nor stability of labor union relations is involved.[1]

---

[1] We distinguish the rulings of other circuits applying the six-month NLRA limitation on similar grounds. *Local Union 1397 v. United Steelworkers*, 748 F.2d 180, 184 (3d Cir. 1984), concerned alleged violations of LMRDA clearly implicating labor management relations. Local Union officials had been disciplined for disagreement with international union officials about "pollution control in steel plants, collective bargaining strategy, construction of new plants, arbitration policies" as well as "internal union governance." 748 F.2d at 182. In *Vallone v. Local Union 705*, 755 F.2d 520 (7th Cir. 1984), union members likewise brought suit under LMRDA for free speech violations occurring in connection with a dispute about modifications of the labor contract. *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984), involved failure to provide copies of the

Since this § 501 suit is not controlled by the rationale of *DelCostello* and its progeny, the district court declined to apply the NLRA limitation. Instead, the district court applied the federal equitable doctrine of laches and still found the suit timely filed. In so doing, the court recognized another exception to *UAW v. Hoosier's* suggested reliance on state statutes of limitations. Policies underlying the creation of federal equitable claims are not well served by applying rigid limitations; therefore, federal courts considering federal equitable claims should rely on equitable principles. *See Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed.2d 743 (1946). Since a § 501 suit for an accounting is essentially equitable in nature, *see Local 92, International Association of Bridge Workers v. Norris*, 383 F.2d 735, 741 (5th Cir. 1967), laches is an appropriate test for timeliness. *Accord Morrissey v. Curran*, 482 F. Supp. 31, 40 (S.D.N.Y. 1979); *Yablonski v. UMW*, 80 L.R.R.M. (BNA) 2594 (D.D.C. 1971). The district court in turn correctly applied the doctrine, finding that plaintiffs' May 1, 1980 filing caused no undue prejudice to defendants and therefore the suit was timely filed. *See EEOC v. Dresser Industries, Inc.*, 668 F.2d 1199 (11th Cir. 1982) (laches requires unequitable delay in filing and undue prejudice to defendants).

III. *Misapplication of Strike Funds*

Plaintiffs on cross-appeal assert that the district court erred in its calculation of misspent funds. They contend that defendants should remit all $140,000 paid them since the expenses or compensation claimed were never supported by records, receipts or independent corroborating

---

collective bargaining agreement to union members disputing their discharge from union construction work. The link between labor-management stability and LMRDA is clear in all these cases but not in the instant case.

testimony. Plaintiffs consider the failure to keep records a *per se* breach of fiduciary duty under § 501.

Such a posiiton ignores Congress' admonition that courts must "take into account the special problems and functions of a labor organization" when construing fiduciary duty under § 501. *See* 29 U.S.C. § 501(a). 'Imposing liability on the mere failure to keep receipts would ignore the fact that strike leaders are neither accountants nor comptrollers; their positions as union leaders demonstrate their organizational rather than financial expertise. The district court employer a more appropriate legal standard. A union official fulfills his fiduciary duty, even though he may indirectly benefit from use of union funds, whenever he can show that the funds were authorized by the union and were expended for the benefit of the union. *See Ray v. Young*, 753 F.2d 386 (5th Cir. 1985); *Morrissy v. Curran*, 650 F.2d 1267 (2d Cir. 1981).

The district court correctly applied this rule with regard to each category of contested payments. Plaintiffs disputed the fact that defendant strike leaders received far more than the $20 to $30 per week strike benefit paid rank and file members. The lower court found most of these payments authorized and reasonable simply because defendants spent far more time and effort promoting the strike and boycott than other union members.[2] Not only did their efforts benefit the union, they precluded defendants from working elsewhere to meet their household expenses. Conversely, the lower court disallowed a number of third party payments as unauthorized by union rules and manifestly unreasonable since such payments would

---

[2] For example, defendant Billy Bryan, former president of the Local, worked twelve to sixteen hours per day, five to six days a week on strike maintenance. Charlie Greene acted first as assistant and then principal treasurer for the strike fund, working three to four days each week. These men, as well as the other defendants, also made numerous trips in support of the strike and boycott.

not have been made to rank and file members and the union reecived no benefit from the payments.[3]

The trial court took a creative, but certainly not inequitable, approach in reviewing the final category of payments, those for travel expenses. These payments cannot be disallowed as a matter of law since there is no showing that defendants' trips were unauthorized. Indeed, defendants must have incurred some expense since plaintiffs failed to show that any of the trips did not take place. Personal benefit occurs only if the pre-trip expense money was not completely spent on the single trip for which it was issued. Any overage would be unauthorized and manifestly unreasonable since defendants would have been overcompensated. *See Ray v. Young, supra* at 392, (double reimbursement for expenses voids authorization and requires reimbursement). The trial court's use of an average time, distance and cost for each challenged trip seems an acceptable means, in the absence of specific records, or determining whether defendants were overcompensated for trip expenses. Approximation is necessary as a matter of equity where plaintiffs have failed to disprove the fact of a trip. The court's function in a § 501 accounting is not to impose, through the penalty of reimbursement, specific record keeping procedures. Courts should intervene in a union's financial affairs only when authorized payments are "significantly above a fair range of reasonableness." *Morrissey v. Curran, supra* at 1275. Thus, we affirm the district court order to return $14,460 to the international union.

IV. *Attorneys' Fees*

A. Setting the Appropriate Fee

Plaintiffs' attorney assert several errors by the district court in its calculation of their fee. First, they

---

[3] These third party payments included strike fund checks negotiated, for example, to pay for clothing, household goods, and auto repairs on cars not used for union business.

claim that unrebutted affidavits regarding hours and hourly rates were improperly ignored. Second, they claim that the court failed to increase basic fees to reflect the contingent aspects of the case, despite case law authorizing such upward adjustment. Third, they suggest that cutting the already diminished fee by an additional 60% contradicts the lower court's finding of substantial non-monetary benefits produced by this suit. Despite these arguments, we affirm the fee award of $42,000.

Section 501(b) of the LMRDA authorizes the award of reasonable attorney fees and expenses in cases such as this one.[4] The district court has properly considered plaintiffs' attorneys' request for $203,587.50 in fees, plus an enhancement of 50%, for a total of $305,381.25. Plaintiffs claim that 1,749 hours were spent on the case at an average rate of $116.40. Plaintiffs' three attorneys claimed individual hourly rates of $125 (out-of-town counsel) and $80 (local counsel). The district court relying on *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-18 (5th Cir.1974), eliminated about one-third of the hours claimed as unnecessary, duplicative or poorly documented. Next, the court selected $90 as the appropriate hourly fee since plaintiffs' affidavit listed local community rates within a range of $75 to $200. This figure is not clearly erroneous and is consistent with the dictates of *Johnson, supra.* Indeed, the district court merely employed a sense of "billing judgment" customarily used in private practice. *See Hensley, supra* at 1940. Thus, the district court correctly found a starting point fee of $90,000 to $100,000.

---

[4] 29 U.S.C. § 501(b) provides: "The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

Furthermore, the district court clearly did not err in refusing to enhance the starting point or "lodestar" fee. Plaintiff's attorneys cite the following justification for enhancement by 50%: complex legal issues, high risk of loss, substantial time investment with low probability of compensation, important values at stake, and potentially large monetary and non-monetary benefits to USW members. The Supreme Court recently rejected such reasons for enhancement. *See Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The *Stenson* Court found that novelty and complexity are reflected in the number of hours expended; additional compensation is merely "double counting." 104 S.Ct. at 1549. Further, the benefits resulting from this litigation do not justify an enhancement of the starting point fee. To the contrary, the results support the district court's reduction of the fee.

We find that the district court correctly decreased the fee award from a maximum starting point of $100,000 to only $42,000. The Supreme Court has recognized that the quality of results obtained is an "important factor" in reaching a final fee amount. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee . . . . If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley, supra* at 1940-41. Plaintiffs certainly did not obtain excellent monetary results here as only 10% of the amount sought was actually obtained. Indeed, the trial court found that at most $50,000 constituted questionable payments. In undertaking any case counsel is obligated to consider the amount involved, the merits of the client's cause, and the chance of success at the outcome of the representation. Here plaintiffs sought recovery of $140,000 in the lawsuit but requested $305,000 in fees at the conclusion of the case. Fees of $300,000 or even $100,000 are inappropriate

where only $15,000 is recovered. In *Blum v. Stenson*, *supra*, the Supreme Court specifically held that enhancement of a fee is permissible where there is exceptional success. As part of the same reasoning, it must be accepted that fees have to be reduced on occasion when the result was less than a success, as occurred here. The result had to have been foreseeable by counsel and they have to share some of the loss along with plaintiffs, as the converse would be true if exceptional success had been achieved. We refuse to give any credit for the contingency factor, since counsel failed to properly appraise the case at the outset. Also, in considering the level of success, we note that counsel failed to join timely defendant USF & G so that it would have been available as a defendant to contribute to a possible settlement. The district court properly considered *Johnson*, *Hensley*, and *Blum*, and reached an appropriate fee award.

The court's award is, moreover, consistent with prior cases under § 501. *See Local 92, International Association of Bridge Workers v. Norris*, 383 F.2d 735 (5th Cir. 1971); *Highway Truck Drivers v. Cohen*, 220 F.Supp. 735 (E.D.Pa.1963). Plaintiffs' counsel cite no cases in which the spread between fees and recovery are as great as that requested in this case. In fact, the award in this case is more generous than those cited above. Here, plaintiffs' counsel will receive three times the monetary recovery; in *Cohen*, the attorneys received half that much; and in *Norris*, they received less than the award itself. To the extent the fee exceeds the recovery, counsel has been compensated for the non-monetary as well as the monetary benefits produced by their efforts on plaintiffs' behalf.

B. Union's Liability for Fees

USW, the union beneficiary of all funds recovered by plaintiffs in this suit, intervened to limit the fee award. Under the terms of the statute, the union has an oppor-

tunity to prosecute plaintiff's claim of misapplied funds. If the union declines and the claim proves meritorious nonetheless, the union may be required to pay the cost of plaintiff's efforts. USW asserts that even if plaintiffs have recovered $14,460 in union funds, the international union should not be required to pay more than that amount for plaintiff's attorneys' fees. The district court held to the contrary, citing the former Fifth Circuit opinion in *Local 92 v. Norris*, 383 F.2d 735 (5th Cir.1967). *Norris* held that an international union could be liable for attorney fees if the misapplied funds had not yet been returned to the union. Additionally, *Norris* held that the fees could exceed the recovery. Under the rule of *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), we are bound by the holding of *Norris*.

USW claims that recent Supreme Court rulings on attorney fee awards, principally *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967), and *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), have rendered *Norris* non-binding precedent in this circuit. *See County of Monroe, Florida v. Department of Labor*, 690 F.2d 1359 (11th Cir.1982) (prior panel decision is not binding when contradicted by USW argues that the holding in *Norris* ignores the plain language and history of the statute, which clearly limits fee awards to the amount of the recovery.

First, we cannot agree that *Fleischmann* and *Aleyska* have undermined *Norris*' precedential value. In both cases the Supreme Court declined to authorize an award of attorney fees when the federal statute which was the basis of the lawsuit did not authorize such an award. *Fleischmann* holds that where Congress has set out a detailed scheme of remedies for a statutory cause of action, courts may not expand those remedies on the basis of general equitable principles. *See* 87 S.Ct. at 1408-09. The remedies provided under § 501 of the LMRDA do

not approach the specificity of those considered in *Fleischmann*, an action for trademark infringement under the Lanham Act. The latter statute provides for injunction and recovery of damages, defendant's profits, and costs including fees for clerks, marshals, court reporters, witnesses, printing, copying and docket fees. *See* 28 U.S.C. § 1920. Notably omitted is any reference to attorney fees. Section 501(b) provides that plaintiffs may sue for an accounting, damages or "other appropriate relief" and provides for an award of attorney fees. While this language is more specific than that of other sections of the LMRDA, *see, e.g.*, 29 U.S.C. § 412 (suit for "such relief (including injunctions) as may be appropriate"), it hardly sets forth the comprehensive remedies found in the Lanham Act. Furthermore, there is no evidence that Congress meant to prohibit equitable remedies under § 501. On the contrary, Congress' reference to an accounting seems an affirmative invitation to rely upon equity in enforcing fiduciary duties. *See Norris*, 383 F.2d at 743. Thus, *Fleischmann* is not authority for our overruling *Norris* and holding that an attorney's fee may not exceed the amount of the recovery.

USW's reliance on *Alyeska* is similarly unpersuasive. In that case the Supreme Court held that courts may not shift attorney's fees simply to encourage private enforcement of legislation in the public interest. *See id.* 95 S.Ct. at 1627. If Congress has not provided expressly for fee-shifting, courts may not fill the gap by rewarding successful plaintiffs for acting as "private attorneys general."

While *Alyeska* may spell the end of fee-shifting in the absence of statutory authorization, it does not control the present case. First, and most obviously, § 501 of the LMRDA expressly authorizes fee-shifting. Second, the Supreme Court's analysis in *Alyeska* focused on the private attorney general concept. *See* 421 U.S. at 260, 95 S.Ct. at 1623. It could not deal with the common benefit

theory, the principle at issue in this case, because under the facts of *Alyeska*, fees could not be shifted to the direct beneficiaries of the suit.[5] Thus, the holding of *Alyeska* in no way impairs the holding of *Norris*. Indeed, fee-shifting in excess of the recovery under § 501 has survived *Alyeska* intact. The District of Columbia Circuit, for example, has implicitly reaffirmed such fee-shifting in post-*Alyeska* cases. *See, e.g., Usery v. Local 639, International Brotherhood of Teamsters*, 543 F.2d 369 (D.C.Cir.1976) (noting that *Alyeska* did not impair the common benefit theory used in LMRDA cases); *Monzillo v. Biller*, 735 F.2d 1456 (D.C.Cir.1984).

While we affirm that *Norris* remains good law, we also point out that its allowance of fees in excess of judgment is fully consistent with the legislative purpose of § 501. As the Supreme Court has noted, the LMRDA reflects "calculated ambiguity [and] political compromise" rather than a precise congressional directive. *See Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 1949 n.17, 36 L.Ed.2d 702 (1973) (quoting Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich.L. Rev. 819, 852 (1960)). The better guide to statutory construction here is Congress' ultimate purpose in legislating, not its "plain language."[6] *See id.* The

---

[5] The plaintiffs in *Alyeska*, several environmental groups, had sought to prevent construction of the trans-Alaska pipeline by bringing suit against the Secretary of the Interior. The groups sought an injunction against issuance of permits facilitating the acquisition of land for the pipeline. *See* 421 U.S. at 242-45, 95 S.Ct. at 1614-15. At the close of litigation, the District of Columbia Circuit directed the pipeline company to reimburse one-half of the plaintiffs' attorneys' fees. *See id.* at 1616. Consequently, the cost of litigation would have been borne by the pipeline's customers but the benefits of enforcing the environmental laws at issue would have redounded to the general public.

[6] This response to the "plain language" argument applies equally well to USW's argument on legislative history. USW relies on the fact that from the Senate floor, prior to passage, Senator Goldwater criticized the legislation on this very point. He noted that

LMRDA's purpose is to impose fiduciary duties on union leaders and to remove disincentives to enforcement of those duties by union members. *See Bakery Workers v. Ratner*, 335 F.2d 691, 696 (D.C.Cir.1964). Strictly limiting fees to the amount recovered would frustrate that purpose. *See id.*

Nowhere is this realization clearer than in the courts' routine allowance of fees in suits for injunction or other non-monetary relief under LMRDA. *See, e.g., Monzillo v. Biller*, 735 F.2d 1456 (D.C.Cir.1984) (suit for injunction); *Marshall v. United Steelworkers*, 666 F.2d 845 (3d Cir.1981) (suit to overturn election results); *Usery v. Local 630, International Brotherhood of Teamsters*, 543 F.2d 369 (D.C.Cir.1976) (intervention in suit to overturn election results). Such fee-shifting is based on the common benefit theory, the equitable principle which requires that those who directly benefit by litigation must reimburse the successful plaintiff's costs or stand unjustly enriched. *See Usery, supra* at 382 (citing *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed.2d 1184 (1939)).

Since neither Supreme Court precedent nor congressional intent limit the scope of § 501(b), we reject USW's contention that fee-shifting in excess of the re-

---

the language of section 501 differed from that in other parts of the bill, the latter specifically authorizing fees in addition to, rather than as a portion of, the monetary recovery. *See* 105 Cong. Rec. 16489 (daily ed. Aug. 20, 1959) (statement of Sen. Goldwater). Senator Goldwater warned that this difference would inhibit member enforcement since the cost of litigation could exceed the fund recovered. USW concluded that since neither house amended the bill to conform section 501 with other sections, Congress intended to strictly limit fees to the amount of the recovery. While USW's research is sound, its conclusion is faulty. It is true that Congress generally acts for a reason, and often for reasons set forth in the legislative history, but we can never be sure, in the absence of an explicit statement, why Congress fails to act. Any conclusions about legislative intent drawn from the sequence of events merits the same skepticism due the plain language of the statute.

covery is always impermissible. Rather, we find such relief necessary to effect the equitable goals of § 501. Nonetheless, fees above the recovery are not automatically shifted simply because they represent a reasonable amount under the *Hensley-Stenson* factors discussed at patr IV A, *supra*. To shift the excess, the plaintiff must prove that litigation confers significant non-monetary benefits on those persons who will ultimately pay the fees. *See Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). Furthermore, those fees must spread the cost proportionally among those who benefit. *See Shimman v. Local 18, International Union of Operating Engineers*, 744 F.2d 1226, 1235 (6th Cir.1984) (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970)).

Proportionality of cost and benefit is obvious here, since the strike funds were actually provided by USW and USW would both recover them and pay the fees under the district court order. As the District of Columbia Circuit has noted, payment of fees by the union under LMRDA is a quintessential example of proportionality: there is "a close match between the party assessed and the beneficiary of the litigation." *See Usery, supra* at 383. Thus, we reject USW's claim that only the defunct Local will benefit from this suit. In reality, neither the Local nor the plaintiffs will realize a penny.

Substantial non-monetary benefits from the suit are less obvious, but not clearly erroneous. The district court found two. First, the suit exposed the practical flaws in USW's strike fund accounting procedures. Second, plaintiffs' ultimate recovery demonstrates that USW cannot rely on Department of Labor investigations to find fiduciary breaches in Local affairs. USW considers these benefits insubstantial because it plans no change in accounting procedures nor has the court ordered any. Thus, the so-called "benefit" would only "result [from] the realization that the union would have to reform itself

or risk exposure to further liability." *Shimman v. Local 18, International Union of Operating Engineers*, 744 F.2d 1226, 1235 n.13 (6th Cir. 1984). USW suggests that we follow the Sixth Circuit, which has refused to shift fees in just this sort of case because the benefit, in its opinion, is no different from results achieved under the private attorney general theory.

We decline to apply *Shimman* to this case. *Shimman*'s primary benefit, in the sum of $225,000, ran solely to the named plaintiff, compensating him for assault and battery and violation of his free speech rights. Any incentive for change in union policy was largely ancillary to plaintiff's personal recovery. Here, in contrast, the monetary recovery, as well as the incentive to change, directly concerns USW rather than the plaintiffs. Furthermore, we do not find such incentive an insubstantial benefit. Substantiality does not rest on compulsory reform or injunctive relief. The District of Columbia Circuit has found substantial benefits as the result of preliminary injunctions and the mere filing of suit for such an injunction. *See Yablonski v. UMW*, 466 F.2d 424 (D.C. Cir. 1972). Compulsion was not possible in *Yablonski* since the merits were never reached, yet, the court found a benefit and shifted fees. Similarly, that circuit and the Third Circuit have found benefits sufficient to shift fees where the plaintiff has only intervened in a suit brought by the Secretary of Labor. *See Marshall v. United Steelworkers*, 666 F.2d 845 (3d Cir. 1981); *Usery v. Local 639, International Brotherhood of Teamsters*, 543 F.2d 369 (D.C. Cir. 1976). The benefits were said to be the intervenor's unique perspective on the case and the possibility he might discover new evidence or develop legal arguments for the Secretary's litigation. *See Marshall*, 666 F.2d at 853; *Usery*, 543 F.2d at 383-84. Certainly, if the intervenor's contributions constitute a benefit sufficient to shift fees, plaintiffs' impeachment of USW's strike fund accounting provides a substantial benefit to the members of USW. Thus, we affirm the district court

order that USW pay $42,000 for plaintiffs' attorneys' fees.

V. *Liability Under the Fiduciary Bond*

The final issue on appeal concerns the extent of recovery under USW's fiduciary bond for the defendants. Section 502 of LMRDA requires that "every officer, agent . . . or other representative or employee of any labor organization . . . who handles funds or other property thereof shall be bonded to provide protection against loss by reason of acts of fraud or dishonesty." 29 U.S.C. § 502(a). USF & G, defendant below, had bonded the defendant officials of the Local. Although USF & G was not originally a party to this suit, plaintiffs learned of the USF & G bond about one month after the suit was filed. The bonding company was not joined as a defendant, however, until three years after filing. After a trial on the merits, the district court found that plaintiffs could not recover from USF & G because they had failed to meet the notice and claim provisions of the bonding contract.

Plaintiffs claim error in the district court's finding. They contend that rank and file union members cannot be barred from recovery for failure to comply with notice and claim provisions. *See Giordani v. Hoffman*, 295 F. Supp. 463 (E.D. Pa. 1969); *Purcell v. Keane*, 277 F. Supp. 252 (E.D. Pa. 1967). Although *Giordani* and *Purcell* allowed claims in spite of failure to comply with the bond provisions, those cases are not controlling here. Since the bonding companies had been jointed in the original complaints in those cases, prejudicial delay was not at issue. Here, plaintiffs delayed for three years after they received actual knowledge of the bond's existence; during that time, they never inquired as to the bond's provisions. Plaintiffs claim they were distracted by the hotly contested issue of standing to sue. While distraction certainly is possible, it is no excuse for failure to diligently

pursue all claims arising from the misapplication of strike funds. *See United Klans v. McGovern*, 621 F.2d 152 (5th Cir. 1980) (once plaintiff has inquiry notice of claims, statute of limitations begins to run). Contrary to plaintiffs' assertions, prejudice to USF & G from this delay in joinder is certainly not speculative. USF & G was denied the opportunity to challenge plaintiffs' standing under § 501, to argue for or against intervention by USW, and to participate in much of the discovery prior to trial. We conclude, therefore, that plaintiffs' claim against USF & G is barred for lack of due diligence. We affirm the district court's finding.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

Docket No. 81-83-N

UNITED STATES OF AMERICA

vs.

BILLY RAY BRYAN,

Defendant

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—November 18, 1981

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Honorables James Nolan and Mark White

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

FINDING &
JUDGMENT

There being a verdict of

☒ NOT GUILTY on February 26, 1982, to remaining count Defendant is discharged

☐ GUILTY.

Honorables Mark White and Jerome Cooper appeared as counsel for trial.

Defendant was charged of the offense(s) of violation of Title 29, Section 501(c), United States Code, (embezzeling and converting to own use and use of another moneys and funds of a labor organization).

Count 2 of the indictment was dismissed February 24, 1982, upon defendant's oral motion for judgment of acquittal.

SENTENCE OR
PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ———.

SPECIAL CONDITIONS
OF PROBATION

ADDITIONAL CONDITIONS
OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side

of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, ————————.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ Myron H. Thompson
MYRON H. THOMPSON
U.S. District Judge

Date February 26, 1982

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

Docket No. 81-83-N

UNITED STATES OF AMERICA

vs.

ARTHUR COMER,

Defendant

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—November 18, 1981

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Honorables James Nolan and Mark White

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

FINDING &
JUDGMENT

There being a verdict of

☒ NOT GUILTY on February 26, 1982, to remaining count Defendant is discharged

☐ GUILTY.

Honorables Mark White and Jerome Cooper appeared as counsel for trial.

Defendant was charged of the offense(s) of violation of Title 29, Section 501(c), United States Code, (embezzeling and converting to own use and use of another moneys and funds of a labor organization).

SENTENCE OR
PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ———.

SPECIAL CONDITIONS
OF PROBATION

ADDITIONAL CONDITIONS
OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the

probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, ————————.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ Myron H. Thompson
MYRON H. THOMPSON
U.S. District Judge

Date February 26, 1982

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

Docket No. 81-83-N

UNITED STATES OF AMERICA

vs.

CHARLIE C. GREEN,
Defendant

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—November 18, 1981

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Honorables James Nolan and Mark White

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

FINDING &
JUDGMENT

There being a verdict of

☒ NOT GUILTY on February 26, 1982. Defendant is discharged

☐ GUILTY.

Honorables Mark White and Jerome Cooper appeared as counsel for trial.

Defendant was charged of the offense(s) of violation of Title 29, Section 501(c), United States Code, (embezzeling and converting to own use and use of another moneys and funds of a labor organization).

SENTENCE OR
PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ———.

SPECIAL CONDITIONS
OF PROBATION

ADDITIONAL CONDITIONS
OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the

probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, ————————.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ Myron H. Thompson
MYRON H. THOMPSON
U.S. District Judge

Date February 26, 1982

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

Docket No. 81-83-N

UNITED STATES OF AMERICA

vs.

GEORGE D. BULLARD,
Defendant

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—November 18, 1981

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Honorables James Nolan and Mark White

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

FINDING &
JUDGMENT

There being a finding of

☒ NOT GUILTY on February 26, 1982. Defendant's motion for judgment of acquittal granted. Defendant is discharged

☐ GUILTY.

Honorable C. Burton Dunn appeared as counsel for trial.

Defendant was charged of the offense(s) of violation of Title 29, Section 501(c), United States Code, (embezzeling and converting to own use and use of another moneys and funds of a labor organization).

SENTENCE OR
PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ———.

SPECIAL CONDITIONS
OF PROBATION

ADDITIONAL CONDITIONS
OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the

probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, ————————.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ Myron H. Thompson
MYRON H. THOMPSON
U.S. District Judge

Date February 26, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7559

ELBERT ERKINS, SAMUEL DENSON, and PERRY CULPEPPER,
Plaintiffs-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellees,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor-Appellee.

March 19, 1982

On Petition for Rehearing, 663 F.2d 1048, and Suggestion for Rehearing En Banc; Truman M. Hobbs, Judge.

Before TUTTLE, HENDERSON, and HATCHETT, Circuit Judges.

PER CURIAM:

The statement contained in the opinions that "petitioners are still employees of American Building Company," appears not to be supported by the evidence in the record. It is therefore stricken from the opinion.

The Petition for Rehearing is DENIED.

No member of this panel or Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 25), the suggestion for Rehearing En Banc is DENIED.